

## The Good Samaritan in the Chinese society: Morality vis-à-vis law

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# **The Good Samaritan in the Chinese Society: Morality *vis-à-vis* Law**

## **Abstract**

Apathy has become a problem which endangers Chinese society, in part because those assisting the injured could be exposed to liabilities. With reference to both law and morality, the longstanding issue of “duty to rescue” is explored in the Chinese socio-legal context. It remains highly controversial whether it is legitimate or justifiable to impose a legal duty on “Good Samaritans” to assist people who are in perilous situations. Reference is also made to the legislative response of other major jurisdictions, which are examined and compared taking into account their social and legal specificities. A tentative conclusion is provided that China should take a pragmatic position: in between harsh civil law jurisdictions, and common law jurisdictions (which have traditionally been averse to making moral duties actionable legal claims). Arguably, Good Samaritan laws can provide a moral compass that directs the public appropriately in assisting people in distress. Law should not only reflect society’s moral values; law also has a role to play in reshaping morality in China’s rapidly changing society.

## **Introduction**

In the New Testament, the Good Samaritan parable refers to a man who rescued a victim lying on roadside. Religious officials had ignored the man when they had walked past him.<sup>1</sup> Nowadays, Good Samaritan often denotes a selfless person who rescues another who has

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<sup>1</sup> New Testament, Luke 10:25-37

been harmed. As the world's second largest economy, China's total income is expected to shoot to £25.5 trillion by 2016.<sup>2</sup> However, Chinese morals and mutual trust are eroding; there is an absence of Samaritanism. Given the moral crisis in China, a Good Samaritan law is a realistic way to enhance public morality, and create a sense of trust. The current law is inadequate because a Good Samaritan always faces a difficult decision between inaction on the one hand, and the possibility of being sued by the victim on the other.<sup>3</sup>

The paper proceeds as follows. Part I analyses a Nanjing Judge's verdict using the logic that the defendant would never have assisted the plaintiff had he not been responsible for the victim's fall in the first place. The foreseeable effects of this questionable judicial precedent are discussed with a particular focus on the public's attitude toward potential rescues in similar situations. Part II puts the controversy into context along with a socio-legal and cultural analysis, explaining why passers-by are often reluctant to intervene. China is unique in the way that morality has influenced legal development throughout history. A variety of issues are examined, including the apparent moral vacuum and *guanxi*. Profound differences can be identified which imply that neither common law nor the civil law approaches can be translated into the Chinese legislative system. Part III looks into the theories which attempt to justify distinctions between civil and common law approaches. China's regional Good Samaritan provision is given detailed discussion, which paves the way for China to implement pragmatic legislation. Part IV reviews several competing theories of legal philosophy. Whether law could change passers-by's behaviour is explored but

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<sup>2</sup> Credit Suisse, 'Global Wealth Report 2014' (October 2014)  
<<https://publications.credit-suisse.com/tasks/render/file/?fileID=60931FDE-A2D2-F568-B041B58C5EA591A4>> 48

<sup>3</sup> Kevin Williams, 'Doctors as Good Samaritans: Some Empirical Evidence Concerning Emergency Medical Treatment in Britain' (2003) 30 *Journal of Law & Society* 258, 282

ultimately left open for further debate. Three viable proposals are put forward to address China's declining morality: the long-standing social safety net, the burden of proof and financial incentives. These proposals may be unable to resolve all of the issues which prevent Good Samaritans from offering assistance, but may nevertheless provide a framework for further discussion. In the final part, a tentative conclusion is given that it is more feasible for China to take a middle ground position, in light of its unique socio-legal and cultural setting.

### **I. *Xu v Peng* (Nanjing Gulou District People's Court, 2007)**

It is a case about a victim demanding damages from her rescuer. On 20 November 2007, Peng was accused of knocking Xu down after he helped the plaintiff by escorting her to the hospital.<sup>4</sup> Xu sued the defendant for ¥RMB 40,000 (£4000) to cover the medical costs. The Nanjing judge made his decision based on common sense, ruling that only the person who had hit a plaintiff would take them to the hospital. This set a precedent that discourages passers-by from being a Good Samaritan.

#### **1. *Peng v Xu-The Plausible Common Sense***

In 2007, Peng was sued after escorting-out of altruism-to the hospital Xu who had broken her leg. Although neither party provided sufficient evidence, the judge ordered Peng to pay 40% of Xu's medical costs in the first instance. The case highlights the gap between controversial judicial decision-making and public perception. Under public pressure, the court adjusted its verdict, which resulted in the defendant paying 10% of the costs. In terms

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<sup>4</sup> *Xu v Peng* [Nanjing Gulou District People's Court] 3 September 2007

of defendant's liability, the court held that there was insufficient evidence to eliminate the possibility that the defendant had knocked down the plaintiff. The common sense principle that the Nanjing judge seems to be advocating is that only guilty parties help the injured.

*(a) Only the Guilty Rescues the Injured*

The Nanjing judge has improperly relied on personal speculation to determine the defendant's culpability.<sup>5</sup> The judge held that Peng would not have helped Xu had he not been responsible for her fall. He came to this conclusion because, in his opinion, no one would help another person unless they felt guilty. At most, 'normal' people would have left Xu after escorting her to the hospital, instead of remaining until the surgical check had been completed. The Nanjing judge gave the following reasoning:

"According to sociological reasoning, when the plaintiff's family arrived, he could have stated the facts clearly, had the plaintiff's family taken her to the hospital, and then departed the scene. But the defendant did not make this choice; his actions are conspicuously at odds with reason."<sup>6</sup>

The judge considers financial exchanges between strangers to run contrary to social norms; in the judge's logic, a defendant would only pay medical costs when they had a guilty conscience. Peng should not have paid the plaintiff's medical fee (RMB¥ 200 (£20)) without requesting a return. Based on his own common sense and his own life experiences, the Nanjing judge inferred that Peng was responsible for the plaintiff's fall. Thus the burden was on Peng to prove his innocence. The current legal systems remain inadequate to protect

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<sup>5</sup> Melody Young, 'The Aftermath of Peng Yu: Restoring Helping Behaviour in China' (2013) 22 Pacific Rim Law & Policy Journal 691, 711 at 698

<sup>6</sup> *Xu v Peng* [Nanjing Gulou District People's Court] 3 September 2007

Good Samaritans when the beneficiary's accusation proves to be a fabrication.<sup>7</sup> In the reported cases to date, there has not been a single judgement in favour of the rescuer.<sup>8</sup> The overreliance on common sense by the Nanjing judge, demonstrates an indifference towards the rule of law, as well as being against progressive values. After all, a genuine commitment to fostering altruism requires a favourable legal response.<sup>9</sup> Essentially, the judgement encourages unsubstantiated claims for monetary damages by using common sense presumptions instead of evidence. This is a dangerous position to be in, and it may well lead to true offenders going unpunished.<sup>10</sup>

*(b) The Defective Reasoning by Reversing the Burden of Proof*

The judge's reasoning is flawed and illogical because he places the burden of proof on the defendant. However, it is well-established that the plaintiff should provide sufficient evidence to substantiate their claim, or rebut the defendant's counterclaim.<sup>11</sup> The Nanjing judge has reversed the burden of proof requiring the defendant to prove that he is not culpable. In tort, presumption of fault is only applied in certain circumstances stipulated by law, that is, liability shall be assumed unless the defendant rebuts the accusation.<sup>12</sup> Tort law does not indicate how Peng's case should be decided. In this case, the plaintiff should have

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<sup>7</sup> Adam Minter, 'China's Infamous Good Samaritan Case Gets a New Ending' *Bloomberg* (17 January 2012)

<sup>8</sup> Yunxiang Yuan, 'The Good Samaritan's New Trouble: A Study of the Changing Moral Landscape in Contemporary China' (2009) 17 (1) *Social Anthropology* 9, 24 at 14

<sup>9</sup> Hanoch Dagan, 'In Defence of the Good Samaritan' (1999) 97 (5) *Michigan Law Review* 1152, 1200, at 1166

<sup>10</sup> Sheng Chao, 'China Scares Off Good Samaritans' *Economic Observer* (2 September 2011)

<sup>11</sup> The Civil Procedural Law (9 April 1991) Article 64; Supreme People's Court, *Some Provisions on Evidence in Civil Procedures* (6 December 2001) Articles 1, 2

<sup>12</sup> Tort Liability Law of the People's Republic of China Article 6

(The Tort Law was adopted at the 12<sup>th</sup> Session of the Standing Committee of the 11<sup>th</sup> National People's Congress on 26 December 2009, and then came into effect on 1 July 2010)

had the burden of proving a *prima facie* case that the defendant was liable.<sup>13</sup> As it stands, the judicial system emboldens people to chance litigation to cover their medical costs. There are numerous precedents where rescuers have been framed by the beneficiary. Immediately after *Xu v Peng*, in a similar case, the defendant, Jundong Wu, was ordered by a local court to pay RMB¥70,000 (£7000) in compensation to an elderly couple based on Nanjing judge's reasoning.<sup>14</sup> Despite the lack of evidence, the court held that Wu would not have taken the couple to the hospital had he not been at fault. These cases show that injured parties can falsely accuse Good Samaritans as a means of recovering monetary damages. The above cases have diminished the public's trust in the judicial system which harms the sanctity of law. It has also had a profound effect on Chinese moral standards; people are increasingly hesitant to render assistance when strangers need help.<sup>15</sup>

## **2. Chilling Effects on Good Samaritan**

The ruling in *Xu v Peng* not only causes the judicial system to lose credibility but also constitutes a heavy blow to social trust and the principle of moral reciprocity.<sup>16</sup> Much worse, the case has had a particularly negative impact on attitudes towards civic duties. The defective reasoning underpinning the verdict in *Xu v Peng* has led to a chilling effect on the willingness of people to act as a Good Samaritan. A dilemma frequently arises when passers-

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<sup>13</sup> Mengyun Tang, 'Does China Need Good Samaritan Laws to Save Yue Yue?' (2014) 47 (1) Cornell International Law Journal 205, 231 at 222

<sup>14</sup> *Jundong Wu v Hu & Dai* (Zhejiang Jinhua Intermediate People's Court, 2011)

<sup>15</sup> Melody Young, 'The Aftermath of Peng Yu: Restoring Helping Behaviour in China' (2013) 22 Pacific Rim Law & Policy Journal 691, 711 at 701

<sup>16</sup> 'The Unkindness of Strangers' *The Economist* (27 July 2013)

by attempt to assist people in need.<sup>17</sup> Rescuing strangers can be risky. Most passers-by are increasingly concerned that victims can extort money from them if they try to help. As a result, passers-by use these legal rulings to justify ignoring victims who are in need of assistance. This has led to a decline in Chinese moral standards. The chilling effect is reflected from some online surveys by various institutions below.

Surveyors	Willing to Help	Ignore	Conditional Help
Hong Kong-based Phoenix Television <sup>18</sup> (20,000 participants) 22 May 2012	≤7%	≥45%	43% would help only if there was a camera.
China Youth Daily <sup>19</sup> (139,010 participants) 13 December 2013	5.4%	55.6%	23.4% would offer help after finding a witness; 12.6% would call police.
Sina Weibo <sup>20</sup> (China's premier blog) 20 December 2013	20%	43%	38% undecided or unsure

The majority of participants would ignore the victim and leave straight away, while only a small proportion of participants would be willing to help without hesitation. The 2016 World Giving Index revealed that only 24% of Chinese respondents said they had helped a stranger in the past month, which was ranked the last.<sup>21</sup> The primary excuse for not helping is a fear of legal action. The survey may not identify apathy as the sole reason for such behaviour, but may also show that the participants do not trust the Chinese judicial system to give fair

<sup>17</sup> James Buchanan, 'The Samaritan's Dilemma' in Edmund Prelim, (ed.) *Altruism, Morality and Economic Theory* (New York: Russell Sage, 1975) 71-85

<sup>18</sup> [http://news.ifeng.com/mainland/detail\\_2012\\_05/22/14708059\\_0.shtml](http://news.ifeng.com/mainland/detail_2012_05/22/14708059_0.shtml)

<sup>19</sup> China Youth Daily (10 December 2013)

[http://zqb.cyol.com/html/2013-12/10/nw.D110000zgqnb\\_20131210\\_2-07.htm](http://zqb.cyol.com/html/2013-12/10/nw.D110000zgqnb_20131210_2-07.htm)

<sup>20</sup> <http://huati.weibo.com/zt/s?k=9739&hasori=1>

<sup>21</sup> Charities Aid Foundation (CAF), 'World Giving Index 2016'

<https://www.cafonline.org/about-us/publications/2016-publications/caf-world-giving-index-2016>



judgments.<sup>22</sup> Nonetheless selfishness and apathy has resulted in the tragic death of double hit-and-run victim. On 13 October 2011, Yue Wang, a two-year old child was run over by two trucks during the course of 17 minutes in Guangdong; 18 people passed by the fatally-injured child.<sup>23</sup> The tragedy symbolises the country's moral decline:<sup>24</sup> apathy is antithetical to a harmonious society. Wang's death has highlighted that China is a conflicted nation. China predominately prides itself on huge economic success, but the *Wang* accident shows that the nation's civic consciousness and moral awareness to be lacking. It is imperative that people look into the reasons behind this societal apathy.

## **II. The In-depth Rationale behind the Irregular Social Phenomenon**

Passers-by tend to take a calculated approach when faced with the moral decision of helping a stranger.<sup>25</sup> It should be a simplest case of doing the right thing; however, decisions to rescue now resembles cost-benefit analysis and rational self-interest. It is not accurate to say that Chinese citizens are intrinsically selfish. There are a myriad of factors that contribute to the current state of affairs.

### **1. The Moral Vacuum**

Contemporary Chinese society lacks a coherent moral narrative, and the country is becoming increasingly indifferent with rampant economic growth. As the second largest

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<sup>22</sup> Melody Young, 'The Aftermath of Peng Yu: Restoring Helping Behaviour in China' (2013) 22 Pacific Rim Law & Policy Journal 691, 711 at 704

<sup>23</sup> Zhong Wu, 'Little Yueyue and China's Moral Road' *Asian Times* (19 October 2011); 'Outcry in China over Hit-and-Run Toddler Left in Street' *BBC News* (17 October 2011)

<sup>24</sup> Bolin He, 'Debate: Yue Yue' *China Daily* (24 October 2011)

<sup>25</sup> Man Yee Karen Lee, 'The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?' (2015) 2 (1) Asian Journal of Law and Society 55, 92 at 68

economy, China is undergoing rapid transformation but without clear sense of direction. In such a transforming society, there has been a shift from the sombreness of communism to consumerist hedonism.<sup>26</sup> It is argued that the country has got lost in a deadly moral vacuum.<sup>27</sup> The *Cultural Revolution* has destroyed Chinese traditional moral standards. Nearly all of the tradition values were discarded to make way for Mao, the former president of China.<sup>28</sup> The lack of a well-established value system is deepening China's moral crisis.<sup>29</sup> The materialistic pursuit of fortune has replaced traditional altruism and civility, and, as yet, there is no clear alternative. The Chinese Communist Party (CCP) did advocate communal altruism, exemplified by the slogan of "Serve the People".<sup>30</sup> It remains dubious as to whether they really did "serve the people". In the early 1980s, the slogan was replaced by a new mantra of "Pursue Wealth", at any expense. The primacy of materialism and pursuit of self-interest can result in extreme antisocial behaviour. This new campaign has brought about accelerated economic development during the last four decades, which has nevertheless created a moral vacuum. It celebrates material wealth without limitation, for example "To get rich is glorious".<sup>31</sup> As such, there is a moral void emerging from China's materialist approach, which causes civic responsibility to be in decline.

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<sup>26</sup> Yunxiang Yuan, 'The Good Samaritan's New Trouble: A Study of the Changing Moral Landscape in Contemporary China' (2009) 17 (1) *Social Anthropology* 9, 24

<sup>27</sup> Peter Simpson, 'Is this the little girl who taught compassion to China?' *Mail* (21 October 2011)

<sup>28</sup> Jiwei Ci, 'The Moral Crisis in Post-Mao China: Prolegomenon to a Philosophical Analysis' (2009) 56 (1) *Diogenes* 19, 25

<sup>29</sup> Lijia Zhang, 'How can I be proud of my China if we are a nation of 1.4 bn cold hearts?' *Guardian* (22 October 2011)

<sup>30</sup> Hannah Song and Yifan Zhang, 'Wang Yue-Is this a sensationalist story or an example of Chinese attitudes?' <<http://hardboiled.berkeley.edu/archived-issues/year-15/issue-15-2/wang-yue/>>

<sup>31</sup> Clifford Coonan, 'Has China lost its humanity?' *The Independent* (22 October 2011)

Is the rapid march to materialism to blame for the nation's moral bankruptcy? Notably, it is Marxism with materialism at its theoretical core.<sup>32</sup> Inherently constrained by societal hierarchies, people in China do not expect leniency, justice or even rationality from those with power. This perception is related to the prevailing unwillingness to assist others in perilous situations. It can be argued that China has imported free market economics from the West without importing the corresponding ethics.<sup>33</sup> With Chinese traditional moral principles diminishing, a moral vacuum has come into being. Such a vacuum cannot be filled by the free market economics alone. Wealth maximisation and the free market economic model needs a strong moral system to ensure that injustices do not materialise.

## **2. *Guanxi* (Network of Personal Relationships)**

A proverb in China says that "Each person should sweep the snow on his own doorsteps and should not fret about those on his neighbours". Chinese people are so concerned with being part of a network of personal relationships that that affects nearly everyone, and strangers are supposed to "mind their own business".<sup>34</sup> This way of thinking is based on the duty to protect one's family and those within *guanxi*, which may help to explain the uniquely egocentric social structures in Chinese society.<sup>35</sup> It is noted that:

"Society is made up of many circles each comprising a "self," whose connections in turn forms a web of personal relations. One accorded a certain degree of treatment

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<sup>32</sup> Francis Mulhern, *Contemporary Marxist Literary Criticism* (Routledge, 2014) 22-27

<sup>33</sup> Lijia Zhang, 'How can I be proud of my China if we are a nation of 1.4 bn cold hearts?' *Guardian* (22 October 2011)

<sup>34</sup> Stanley Lubman, 'After the Foshan Tragedy: China's Good Samaritan Debate' *The Wall Street Journal* (9 December 2011)

<sup>35</sup> Xiaotong Fei, *From the Soil: The Foundations of Chinese Society* (Berkeley: University of California Press, 1992) 61

to another commensurate with their relationship, the so-called “difference between those who are close and those who are distant.”<sup>36</sup>

The last sentence of the above resonates with that of *guanxi*,<sup>37</sup> which the Chinese rely to “get things done”.<sup>38</sup> Seen as “super law” but with little regard to law, *guanxi* is merely “a strategically constructed network of personal connections” based on “instrumental exchanges of favours”.<sup>39</sup> This inherently divides people into those within *guanxi* and those beyond the network of interpersonal relations. In this vein, *guanxi* constrains Chinese society by fixing the social order, within which people pursue their instrumental ends reciprocally.<sup>40</sup> These inherent norms play an indispensable role in maintaining moral obligations. By the same token, outsiders do not share any of the privileges which arise out of *guanxi*. This may be one of the reasons why Chinese people treat strangers with seeming indifference. It is the absence of *guanxi* that is used to justify inaction when injured strangers need help. This hypothetical is also argued that “China’s traumatic years under Mao Zedong only reinforced the instinct”.<sup>41</sup> As Smith observed in 1894, “Unwillingness to help others is a trait that runs through Chinese social relations in multi-fold manifestations”.<sup>42</sup> This observation, to some extent, reinforces that China needs to cultivate trust beyond *guanxi*.

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<sup>36</sup> Xiaotong Fei, *From the Soil: The Foundations of Chinese Society* (Berkeley: University of California Press, 1992) 67

<sup>37</sup> Man Yee Karen Lee, ‘The Role of Law in Addressing the Good Samaritan’s Dilemma: A Chinese Model?’ (2015) 2 (1) *Asian Journal of Law and Society* 55, 92 at 65

<sup>38</sup> Alan Smart, ‘Expressions of Interest: Friendship and *guanxi* in Chinese Societies’ in Sandra Bell & Simon Coleman (eds.) *The Anthropology of Friendship* (Oxford & New York: Berg, 1999) 119–136 at 120

<sup>39</sup> Yunxiang Yan, ‘The Culture of *Guanxi* in a North China Village’ (1996) 35 *China Journal* 1, 25 at 3–4

<sup>40</sup> Yunxiang Yan, ‘The Culture of *Guanxi* in a North China Village’ (1996) 35 *China Journal* 1, 25

<sup>41</sup> ‘The Unkindness of Strangers’ *The Economist* (27 July 2013)

<sup>42</sup> Arthur Smith, *Chinese Characteristics* (Simon Publications LLC, 2001) 194–218

Another factor worthy of note is urbanisation and largescale migration has altered the way in which Chinese people interact with others. Urban citizens rarely have strong connections anymore, whereas, in the past, rural residents had a strong sense of community.<sup>43</sup> In small rural communities people needed to rely on each other to survive, while society in the 21<sup>st</sup> century relies on self-perseverance.<sup>44</sup> *Guanxi* could be used as a positive influence to unify society, but does not change the fundamental ecology of the modern society.<sup>45</sup> Due to the rapid transformation resulting from the increasing urbanisation, the conventional *guanxi* has steadily declined. Hundreds of millions of peasants are migrating to cities; these cities are turning into communities of strangers. The moral ideal of having harmonious communities does not fit the new social, legal, and cultural landscape.<sup>46</sup> The previous relationship could be characterised by intimacy, trust and interdependence; while urban society is characterised by estrangement, distrust and independence.<sup>47</sup> Urbanisation and the mixing of communities (catalysed by migration) reinforces the reluctance of communities to engage with strangers outside of their immediate social order.

It is difficult to provide an exhaustive list of the factors that contribute to people's apathy and indifference in contemporary Chinese society. For instance, overwhelming levels of corruption does not encourage the public to maintain high moral standards. Corruption weakens the government's moral authority. By the same token, these moral narratives are

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<sup>43</sup> Robert Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* (Princeton University Press, 1993) 28

<sup>44</sup> Kate Hutchings and Georgina Murray, 'Working with *Guanxi*: An Assessment of the Implications of Globalisation on Business Networking in China' (2002) 11 (3) *Creativity and Innovation Management* 184, 191

<sup>45</sup> Jane Nolan, 'Guanxi' *Oxford Bibliographies* (28 July 2015)

<sup>46</sup> Philip Huang, *Chinese Civil Justice, Past and Present* (Rowman & Littlefield, 2010) Chapters 2, 7

<sup>47</sup> Jaime FlorCruz, 'China Soul-Searching after Toddler's Death' *CNN* (22 October 2011)

not openly acknowledged because the makers' legitimacy is not well-justified.<sup>48</sup> Injustice resulting from officialdom can encourage citizens to use immoral means for self-gain.<sup>49</sup> Political and legal corruption deters the public from offering their kindness to other people, especially to strangers. As a consequence, peoples are driven by materialism – resentment permeates and endangers the moral legitimacy of the whole society.<sup>50</sup>

### III. The Good Samaritan Law: A Comparative Perspective

Law can be conceptualised as coerced compliance, representing the bottom line; a person can be punished legitimately for failing to meet this minimum standard.<sup>51</sup> One school of thought held by Max Weber is that law should be purely “formal-rational” unified by legal logic into a consistent whole, and free from the influence of external moral values.<sup>52</sup> This seems to imply a clear dichotomy between legal and moral duties. It seems that juxtaposing law and morality in this way produces too narrow a view of rationality.<sup>53</sup> The issues of law and morality which relate to the Good Samaritan have long been the subject of legislation in the West, where legal systems address them in diverging ways.<sup>54</sup> Civil law countries have placed a legal obligation on passers-by. Controversial as it is, the law in these countries has created a legal duty to rescue; the law also provides legal protection to Good Samaritans to

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<sup>48</sup> Ling Li, ‘Performing Bribery in China: *Guanxi*-Practice, Corruption with A Human Face’ (2011) 20 (1) *Journal of Contemporary China* 1, 20

<sup>49</sup> Jiong Tu, ‘On the moral void in contemporary China’ *Kings Review* (22 May 2014) <<http://kingsreview.co.uk/magazine/blog/2014/05/22/on-the-moral-void-in-contemporary-china/>>

<sup>50</sup> Baogang Guo, ‘Political Legitimacy and China’s Transition’ (2003) 8 (1) *Journal of Chinese Political Science* 1, 25

<sup>51</sup> Jason Brennan, ‘Beyond the Bottom Line: the Theoretical Aims of Moral Theorising’ (2008) 28 (2) *Oxford Journal of Legal Studies* 277, 296

<sup>52</sup> Stephen Kalberg, ‘Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History’ (1980) 85 (5) *The American Journal of Sociology* 1145, 1179 at 1165-66

<sup>53</sup> Mathieu Deflem, *Sociology of Law Visions of a Scholarly Tradition* (New York, Cambridge University Press, 2008) 37-55

<sup>54</sup> John Pardun, ‘Good Samaritan Laws: A Global Perspective’ (1998) 20 *Loyola of Los Angeles International and Comparative Law Journal* 591, 593

avoid unjust results.<sup>55</sup> In contrast, common law jurisdictions have been traditionally averse to imposing a legal duty to rescue.<sup>56</sup> This can be attributed to the fact that individualism is valued to a greater extent in common law jurisdictions.<sup>57</sup> China's legal system seems unable to respond these issues. And, given China's rapidly changing society, it may be practicable to introduce a legal duty to rescue by way of a Good Samaritan law.

## **1. Good Samaritan in Civil Law Jurisdictions**

In the civil law jurisdictions, the duty to rescue is normally considered to be legitimate.<sup>58</sup> Civil law countries have tended to either create a duty to rescue, which punishes those who fail to render assistance, or introduce legislation to shield rescuers from liability.<sup>59</sup> In France, the statute governing the duty to rescue imposes criminal and civil liability when a passer-by fails to render necessary help, and there is no risk to himself or a third party.<sup>60</sup> It provides that:

“A person must assist anyone in jeopardy, unless there is reasonable evidence that it would cause danger to himself or a third party. Abstaining from rendering assistance constitutes an offence, which may result in up to five years imprisonment and a fine of up to €75,000.”<sup>61</sup>

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<sup>55</sup>Samuel Freeman, ‘Criminal Liability and the Duty to Aid the Distressed’ (1994) 142 (5) University of Pennsylvania Law Review 1455, 1492

<sup>56</sup>Eric Grush, ‘Inefficiency of the No-Duty-To-Rescue Rule and a Proposed Similar Risk Alternative’ (1998) 146 (3) University of Pennsylvania Law Review 881, 900

<sup>57</sup>Robert Justin Lipkin, ‘Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue’ (1983) 31 UCLA Law Review 252, 293 at 276

<sup>58</sup>Martin Vranken, ‘Duty to Rescue in Civil Law and Common Law: Les Extremes Se Touchent’ (1998) 47 (4) International and Comparative Law Quarterly 934, 942

<sup>59</sup>Marc Franklin, ‘Vermont Requires Rescue’ (1972) 25 Stanford Law Review 51, 59

<sup>60</sup>Saul Levmore, ‘Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations’ (1986) 72 Virginia Law Review 913, 917

<sup>61</sup>French Criminal Code Article 223-6 [2]

The duty-to-rescue provision treats the offence as pure omission.<sup>62</sup> People that witness a person in peril and do not render assistance can be arrested for inaction. The French legal philosophy is that a witness is considered to be an integral participant to the crime, even in the case of nonfeasance.<sup>63</sup> French courts determine damages by assessing what harm could have been avoided, had a reasonable rescuer rendered assistance.<sup>64</sup> Similarly in Germany, under the clause of “Failure to Render Assistance”: whoever does not render assistance shall be punished with up to one year’s imprisonment or a fine, when he could have helped without imposing risk to himself or third parties.<sup>65</sup> The similar approach goes to the Quebec Charter of Human Rights and Freedoms, which creates a duty to rescue when a life is in peril unless such action involves danger to the rescuer.<sup>66</sup> In contrast, common law jurisdictions do not transform moral duties into legal duties, where moral acts are not legally enforced in principle.<sup>67</sup>

## **2. Good Samaritan in Common Law Jurisdictions**

The common law position holds that the Good Samaritan predicament is purely one of individual empathy, not one of legislative importance.<sup>68</sup> For instance, the UK does not have

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<sup>62</sup> John Kleinig, ‘Criminal Liability for Failures to Act’ (1986) 49 (3) *Law and Contemporary Problems* 161, 180

<sup>63</sup> Edward Tomlinson, ‘The French Experience with Duty to Rescue: a Dubious Case for Criminal Enforcement’ (2000) 20 *New York Law School Law Review* 451

<sup>64</sup> Jennifer Groninger, ‘No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What is Left of the American Rule, and Will It Survive Unabated?’ (1999) 26 *Pepperdine Law Review* 353, 371 at 354

<sup>65</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], §323c (Germany)

<sup>66</sup> Quebec Charter of Human Rights and Freedoms s2

<sup>67</sup> Melvin Eisenberg, ‘The Duty to Rescue in Contract Law’ (2002) 71 (3) *Fordham Law Review* 647; Ernest Weinrib, ‘The Case for a Duty to Rescue’ (1980) 90 *Yale Law Journal* 247

<sup>68</sup> Lynne Henderson, ‘Legality and Empathy’ (1987) 85 *Michigan Law Review* 1579, 1582; Norval Morris, ‘Compensation and the Good Samaritan’ in James Ratcliffe (ed.) *The Good Samaritan and the Law* (Anchor Books, 1966) 135



a duty-to-rescue statute.<sup>69</sup> In *Dorset Yacht Company v Home Office*, Lord Reid expounded the common duty:

“When a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person’s assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty.”<sup>70</sup>

Confirming this stance, Lord Nicholls held in *Stovin v Wise* that: “The recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him.”<sup>71</sup> Inaction does not incur liability *per se*, unless the parties are either within contractual or tortious relationships, or other recognised circumstances which give rise a duty to act.<sup>72</sup> There is a general absence of a Good Samaritan law in the US. To supersede the general common law absence of a duty to rescue, a minority of states have created a legal duty to rescue another in an emergency.<sup>73</sup> For instance, the Duty to Aid the Endangered Act enacted by Vermont in 1967 provides that:

“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”<sup>74</sup>

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<sup>69</sup> Damien Schiff, ‘Samaritans: Good, Bad and Ugly: A Comparative Law Analysis’ (2005) 11 Roger Williams University Law Review 77, 81–83

<sup>70</sup> *Dorset Yacht Company v Home Office* [1970] AC 1004, 1027

<sup>71</sup> *Stovin v. Wise* [1996] 3 All ER 801, 807

<sup>72</sup> Daniel Yeager, ‘A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers’ (1993) 71 Washington University Law Quarterly 1, 58 at 9-10

<sup>73</sup> Francis Bohlen, ‘The Moral Duty to Aid Others as a Basis of Tort Liability’ (1908) 56 University of Pennsylvania Law Review 217, 219

<sup>74</sup> Vt. Acts & Resolves 309 (Adj. Sess.)1967; §2–4 (codified at Vt. Stat. Ann. tit. 12, §519 (1997)); The following states have statutes that impose a legal duty to assist a person in distress, which include California, Florida, Hawaii, Massachusetts, Minnesota, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

Compared with the French legislation, the common law approaches to Good Samaritans appears to be lenient. Regardless of the statutes in place, they are hardly enforced, and the practical effect remains minimal.<sup>75</sup> As Stewart observed, the statutes imposing a duty to rescue in the US “are examples of law easily made but not enforced with any degree of regularity or consistency.”<sup>76</sup> Such an approach seems to suggest that Good Samaritan laws are largely of symbolic importance in the US.<sup>77</sup> Even so, the Federal Rules of Evidence in the US embodies a policy designed to encourage people to do good within the society.<sup>78</sup> A Good Samaritan is generally shielded from liability, unless his attempt to rescue another is considered to be grossly negligent.<sup>79</sup> This mirrors Ontario’s Good Samaritans Act 2001, which removes liability for damages caused by negligence of the rescuer except in cases of gross negligence.<sup>80</sup> With reasonable care and skill, rescuers do not need to worry about legal action being taken against them.

### **3. The Feasibility of Creating a Good Samaritan Law in China: The *Shenzhen Provision***

As one of the most advanced Special Economic Zones in China, Shenzhen has introduced its regional Good Samaritan law, i.e. the *Shenzhen Provision on Good Samaritan*, which became effective on 1 August 2013.<sup>81</sup> The *Shenzhen Provision* provides substantial support to

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<sup>75</sup> McCall Carter, ‘Morality, Law and the Duty to Act: Creating a Common Law Duty to Act Modelled after the Responsibility to Protect Doctrine’ (2010) 2 (1) Washington University Jurisprudence Review 138, 164

<sup>76</sup> Melody Stewart, ‘How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability’ (1998) 25 American Journal of Criminal Law 385, 424

<sup>77</sup> Marc Franklin, ‘Vermont Requires Rescue’ (1972) 25 Stanford Law Review 51, 59 at 55

<sup>78</sup> Federal Rules of Evidence Rule 407-411

<sup>79</sup> Vt. Stat. Ann. tit. 12, §519(c) (1997)

<sup>80</sup> Good Samaritan Act 2001, S.O., c. 2 s2 (1)

<sup>81</sup> Tania Branigan, ‘Chinese City Poised to Introduce Country’s First Good Samaritan Rules’ *Guardian* (29 November 2011)

rescuers who render emergency assistance in good faith.<sup>82</sup> The plaintiff shall bear the burden of proving that his injury has been caused by the Good Samaritan.<sup>83</sup> Specifically, the plaintiff needs to present a *prima facie* case; if the plaintiff cannot do so he will be subject to administrative or even criminal penalties where a case has been fabricated *mala fide*.<sup>84</sup> Good Samaritans have the right to require apologies and/or compensation, restoration of reputation and other damages if the plaintiff violates Article 6 of the *Provision*.<sup>85</sup> Furthermore, witnesses will be rewarded by relevant authorities if they give a testimony on behalf of the Good Samaritan.<sup>86</sup> Last but not least, Good Samaritans will receive legal advice to ensure that they are adequately represented.<sup>87</sup> The *Shenzhen Provision* provides various levels of immunity to prevent rescuers from incurring liability. It is designed to incentivise people to help others by shielding them from lawsuits. This has the potential to reshape attitudes towards morality in China.<sup>88</sup>

The legislative intent behind the *Shenzhen Provision* perfectly accords with Honoré's thoughts, that the law should not only reflect public opinion but also actively encourage better behaviour.<sup>89</sup> He further argues that if the law does not encourage people to rescue others, it is sure to discourage it. If it does not compensate, it will indirectly penalise. If the rescuer who suffers injury or incurs expense goes without compensation, the law, so far as it

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<sup>82</sup> *Shenzhen Provision on Good Samaritan* Article 2

<sup>83</sup> *Shenzhen Provision on Good Samaritan* Articles 3, 4

<sup>84</sup> *Shenzhen Provision on Good Samaritan* Article 6

<sup>85</sup> *Shenzhen Provision on Good Samaritan* Articles 5, 6

<sup>86</sup> *Shenzhen Provision on Good Samaritan* Article 7

<sup>87</sup> *Shenzhen Provision on Good Samaritan* Article 8

<sup>88</sup> Mengyun Tang, 'Does China Need Good Samaritan Laws to Save Yue Yue?' (2014) 47 (1) *Cornell International Law Journal* 205, 231

<sup>89</sup> Philip Romohr, 'A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule' (2006) 55 *Duke Law Journal* 1025, 1057 at 1036

influences conduct at all, is discouraging rescue.<sup>90</sup> The *Shenzhen Provision* does not intend to penalise passers-by for failure to render assistance. Rather, it attempts to impose legal liability on the rescued to deter disingenuous, fabricated cases. The media, under the current social setting, sends the message that Good Samaritans are likely to be extorted by the injured. Given the politics of the situation, regional law addresses these serious concerns innovatively through incentivising the public to rescue those in distress, rather than compelling them to do so. Significantly, the *Shenzhen Provision* requires plaintiffs to provide adequate evidence to prove that the defendant is at fault. It also provides a financial incentive to render assistance by allowing Good Samaritans to claim compensation for their losses borne out of the rescue. This measure would allay the fears of those who hesitate to help because of potential financial losses. Finally, fear of retaliation accounts for some failures to intervene.<sup>91</sup> The *Shenzhen Provision* responds by offering financial rewards to those who speak out. This will improve evidential procedures, and help to ensure substantive justice at trials.

Although law may not fully enforce morals, it does serve as a moral compass.<sup>92</sup> The *Shenzhen Provision* implies that Good Samaritans will be appreciated, which encourages people to render timely assistance. It sends a clear message that Good Samaritans will not be subject to unexpected risks. To an extent, it strikes a fair balance. The *Shenzhen Provision* is also less punitive and coercive than several major civil law jurisdictions, such as Germany and France. Chinese traditional philosophy and Confucianism holds that one should be a

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<sup>90</sup> Antony Honoré (1966), 'Law, Morals, and Rescue' in James Ratcliffe (ed.) *The Good Samaritan and the Law* (Garden City: Doubleday & Company Inc., 1966) 225–232

<sup>91</sup> Daniel Yeager, 'A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers' (1993) 71 *Washington University Law Quarterly* 1, 58 at 15

<sup>92</sup> Steven Shavell, 'Law versus Morality as Regulators of Conduct' (2002) 4 (2) *American Law and Economics Review* 227, 257

Good Samaritan purely because of one's own justice and righteousness.<sup>93</sup> In terms of jurisprudence, the essence of the *Shenzhen Provision* is consistent with China's Criminal Law: an individual is not punished for inaction to render assistance. The support-oriented approach, instead of punishment, is conducive to preserving personal liberty and fostering the culture of altruism.<sup>94</sup> Regional law will hopefully strengthen the moral imperative to rescue. For the sake of certainty and predictability, an effective law must define clearly what actions will be protected. Otherwise, a lack of clarity and details may ultimately hinder its efficiency and enforceability. This proves to be a pragmatic value given China's tradition of a civil law system. It does not follow that flexibility, contrary to fixity, has no its judicial value with particular regard to complex issues. The People's Court will benefit from the flexibility to exercise their discretion, and can make their decisions on an *ad hoc* basis, depending on the facts before them.

#### **4. The Imposition of a Legal Duty to Rescue: The Balance Between Carrots and Sticks**

A middle ground should be sought between unfettered liability and no liability.<sup>95</sup> Individualism represents an underlying social value which is embedded in the common law.<sup>96</sup> Another explanation is that the absence of a legal duty to rescue is due largely to the common law's inherent ability to adapt to the changing needs of society.<sup>97</sup> In contemporary

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<sup>93</sup> Melody Young, 'The Aftermath of Peng Yu: Restoring Helping Behaviour in China' (2013) 22 Pacific Rim Law & Policy Journal 691, 711 at 692

<sup>94</sup> Sungeeta Jain, 'How Many People Does it Take to Save a Drowning Baby? A Good Samaritan Statute in Washington State' (1999) 74 Washington Law Review 181, 202

<sup>95</sup> Ronald Dworkin, 'Justice for Hedgehogs' (2010) 90 (2) Boston University Law Review 469, 477

<sup>96</sup> Robert Justin Lipkin, 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue' (1983) 31 UCLA Law Review 252, 293 at 256

<sup>97</sup> Gillian Hadfield, 'The Dynamic Quality of Law: Judicial Incentives, Legal Human Capital and the Adaptation of Law' (2010) 79 Journal of Economic Behaviour and Organization 80, 94

Chinese society, it is time to create a legal duty to rescue that encourages Good Samaritans to intervene, in turn promoting better moral standards. As Lipkin observed:

“A person has a legal duty to rescue another when he encounters or witnesses that person in an emergency situation, in danger of grave physical harm or death, and the rescuer has the ability to extenuate the victim from the dangerous circumstances without endangering himself or third parties.”<sup>98</sup>

Given China’s plausible moral orthodoxy, it would be more practical for the proposed legislation to strike a balance between harsh civil law and common law positions. By placing civic duties on a legislative footing, the proposed law shows the public's disapproval for bad Samaritanism.<sup>99</sup> There are predictable ways in which morality can be placed within the legislative framework, which can be identified without much knowledge of a country’s cultural norms or sociological features.<sup>100</sup> It is sufficient to use fines or the threat of civil liability. Criminal liability need not always be imposed and occasional judgments against non-rescuers may, like a rule of partial liability, be severe enough to stimulate greater assistance in emergency situations.<sup>101</sup>

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<sup>98</sup> Robert Justin Lipkin, ‘Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue’ (1983) 31 UCLA Law Review 252, 293 at 266

<sup>99</sup> Kirsten Wilson, ‘The Good Samaritan: A Parable of the Past or a Future Affirmative Duty?’ *Bar Journal* (1 March 1999) < <https://www.nhbar.org/publications/archives/display-journal-issue.asp?id=90>>

<sup>100</sup> Saul Levmore, ‘Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations’ (1986) 72 Virginia Law Review 879, 941 at 914

<sup>101</sup> Saul Levmore, ‘Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations’ (1986) 72 Virginia Law Review 879, 941 at 892

## IV. Addressing the Challenge of Law's Legacy *vis-à-vis* Morality

### 1. Would law change the behaviour of Chinese citizens?

In light of the long-standing divergent approaches across jurisdictions, it is beneficial for China to learn from other countries' experiences before having its own national Good Samaritan Law. It is sensible to look into historical classical debates on law and morality.<sup>102</sup> This enquiry may reveal the *pros and cons* of the matter, thereby helping us to ascertain whether a Good Samaritan Law would be a panacea for the moral challenges faced by contemporary Chinese society.

#### *(a) The Debate against Codifying Morality into Law*

There is in fact a distinction between law and morality. Assisting people in distress is conventionally considered a moral duty, which should not be enforced in the judicial realm.<sup>103</sup> McFaland has observed that it is wrong to use law to enforce morality in order to coerce people into being benevolent.<sup>104</sup> Law represents a bottom line crossing which people will be punished, whereas morality establishes a higher behavioural standard. Sir Wolfenden held that: "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."<sup>105</sup> People should enjoy a private moral sphere that is free from forcible human interference.<sup>106</sup> Using law to settle purely moral matters may

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<sup>102</sup> Gerald Dworkin, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 William & Mary Law Review 927, 946

<sup>103</sup> James Barr Ames, 'Law and Morals' (1908) 22 Harvard Law Review 97, 113 at 109

<sup>104</sup> Holly McFaland, 'Could a 'Good Samaritan' Law Help China Become More Compassionate?' *Christian Science Monitor* (3 November 2011)

<sup>105</sup> Sir John Wolfenden, *Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd. 247

<sup>106</sup> Hanoch Dagan, 'In Defence of the Good Samaritan' (1999) 97 (5) Michigan Law Review 1152, 1200

lessen morality's importance as a distinct field of inquiry. It could risk depriving individuals of their liberty and personal autonomy.<sup>107</sup> Imposing a duty to rescue can be viewed as implicitly rejecting the primacy of individual rights.<sup>108</sup> The law's coercive interference in people's lives might even have a counterproductive impact, thus undermining the potentially transformative function of such a law.<sup>109</sup> Alternatively, it is worth exploring the deep-rooted reasons that lead to apathy, and designing a mechanism to incentivise people to render assistance in case of emergency. In addition, coercive law may have unexpected side effects.<sup>110</sup> The case of *Xu v Peng* shows the low quality of the Nanjing judge's reasoning, which epitomises the Chinese juridical *status quo*. It seems unfair to compel passers-by to render assistance when, as things stand, their legal rights are not adequately protected. Imposing a legal duty to rescue in such circumstances will only hinder altruism.<sup>111</sup>

*(b) The Debate for Legalising Good Samaritans*

Hard law and moral norms often interact with each other in a symbiotic manner.<sup>112</sup> Hart has observed that: "there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others."<sup>113</sup> In an endorsement of Hart, Devlin argued that:

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<sup>107</sup> Joel Feinberg, *Harm to Others* (New York, Oxford University Press, 1987) Volume 1; Mark Osbeck, 'Bad Samaritanism and the Duty to Render Aid- A Proposal' (1985) 19 *Michigan Journal of Law Reform* 315, 328

<sup>108</sup> Philip Romohr, 'A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule' (2006) 55 *Duke Law Journal* 1025, 1057 at 1026

<sup>109</sup> Hanoeh Dagan, 'In Defence of the Good Samaritan' (1999) 97 (5) *Michigan Law Review* 1152, 1200, at 1172; William Landes and Richard Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 *Journal of Legal Studies* 83, 94

<sup>110</sup> William Landes and Richard Posner, 'Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism' (1978) 7 *Journal of Legal Studies* 119, 124

<sup>111</sup> Man Yee Karen Lee, 'The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?' (2015) 2 (1) *Asian Journal of Law and Society* 55, 92 at 83

<sup>112</sup> Jay Silver, 'The Duty to Rescue: A Reexamination and Proposal' (1985) 26 *William & Mary Law Review* 423, 448

<sup>113</sup> Herbert Lionel Adolphus Hart, *Law, Liberty and Morality* (Oxford, Oxford University Press, 1963) 5



“It is not possible to settle in advance exceptions to the general rule or to define inflexibly areas of morality into which the law is in no circumstances to be allowed to enter”.<sup>114</sup>

Feinberg even held that: “requiring people to help prevent harms is sometimes as reasonable a legal policy as preventing people, by threat of punishment, from actively causing harms.”<sup>115</sup> Law and morality can complement each other. Coercing an individual to abide by the law may make him more moral.<sup>116</sup> However this will only be the case when law and morality are not in conflict, but are instead consistent both in form and substance. In essence, Good Samaritan legalisation can be justified by harm prevention and the aim of achieving a minimum level of decency.<sup>117</sup> Regardless of the above mentioned concerns, side-effects are an inevitable cost when using law to coerce people to rescue the injured.<sup>118</sup> Despite restricting individual liberties, a legal duty to rescue would be permissible as it furthers the public good, which is superior to the rights of particular persons.<sup>119</sup> After all, personal liberty and altruism are not always antagonistic to one another, which is a prevalent misconception.<sup>120</sup>

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<sup>114</sup> Patrick Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965); Ronald Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1966) 75 Yale Law Journal 986, 1005

<sup>115</sup> Joel Feinberg, *The Moral Limits of the Criminal Law-Harmless Wrongdoing* (New York: Oxford University Press, 1988) Volume 4, xii

<sup>116</sup> Oren Bar-Gill and Omri Ben-Shahar, ‘Credible Coercion’ (2005) 83 (3) Texas Law Review 717, 780

<sup>117</sup> Clayton Gillette, ‘Limitations on the Obligation of Good Faith’ (1981) 30 (4) Duke Law Journal 619, 665

<sup>118</sup> Eugene Volokh, ‘Duties to Rescue and the Anti-cooperative Effects of Law’ (1999) 88 Georgetown Law Journal 105, 114; Larry Wilson, ‘The Defence of Others-Criminal Law and the Good Samaritan’ (1988) 33 McGill Law Journal 756, 811

<sup>119</sup> John Locke, *Two Treatises of Government* (1690) (Peter Laslett ed., Cambridge University Press, 1988) 393-394; Philip Romohr, ‘A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule’ (2006) 55 Duke Law Journal 1025, 1057 at 1049

<sup>120</sup> Robert Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* (Princeton University Press, 1993) 20-23

Changing social conditions leads to the recognition of new duties,<sup>121</sup> which is reinforced by China's unprecedented urban transformation. Precedents often go against the Good Samaritan, which makes people reluctant to help for fear of legal consequences. Since a Good Samaritan is always left in a vulnerable position, law that protects rescuers would serve a useful social purpose, indirectly filling the moral vacuum and increasing people's awareness.<sup>122</sup> With specific regard to the case of *Yue Wang*, where the passers-by's behaviour has failed to meet a minimum standard of decency, legal intervention in the moral realm appears particularly well-justified.<sup>123</sup> Another point worthy of note is that the value of law lies primarily in enhancing awareness rather than punishing people.<sup>124</sup> The core value of law is not that it reflects mainstream morals, but rather that it actively advocates better behaviour. The long-term goal of achieving incremental normative progression counts for more than any immediate effects.<sup>125</sup> In the above case of *Yue Wang*, the bystander refused to render even minimal help in a dire emergency, and went unpunished.<sup>126</sup> There are no legal grounds to compel their assistance. Admittedly, a Good Samaritan law may be insufficient to improve the public's moral standard, but may instead lead to imperceptible changes in people's behaviour.<sup>127</sup> More subtly, law may contribute to

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<sup>121</sup> Daniel Mandelker, 'The Role of Law in Social Change' (1970) 8 (2) Osgoode Hall Law Journal 355, 363

<sup>122</sup> Philip Romohr, 'A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule' (2006) 55 Duke Law Journal 1025, 1057

<sup>123</sup> Man Yee Karen Lee, 'The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?' (2015) 2 (1) Asian Journal of Law and Society 55, 92 at 81

<sup>124</sup> Man Yee Karen Lee, 'The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?' (2015) 2 (1) Asian Journal of Law and Society 55, 92 at 82

<sup>125</sup> Daniel Yeager, 'A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers' (1993) 71 Washington University Law Quarterly 1, 58

<sup>126</sup> Jay Sterling Silver, 'Can the Law Make Us Be Decent?' *The New York Times* (6 November 2012)

<sup>127</sup> Kenworthy Bilz and Janice Nadler, 'Law, Moral Attitudes, and Behavioural Change' in Eyal Zamir and Doron Teichman (eds.) *The Oxford Handbook of Behavioural Economics and the Law* (Oxford, Oxford University Press, 2104) 241-267

building trust beyond *guanxi*.<sup>128</sup> Furthermore, civil society will play an increasingly pivotal role in fostering a culture for Good Samaritans,<sup>129</sup> in which the proposed Good Samaritan laws will increase the likelihood of people offering assistance when needed.<sup>130</sup>

## **2. Addressing Current Challenges**

Few people would risk being a Good Samaritan unless their own rights were adequately protected. Even if a Good Samaritan law were in place, it is still uncertain as to whether law can grant full immunity to an innocent rescuer. This is largely because the dispute often concerns whether an individual has rescued the injured party or caused the injury in the first place. The underlying problem thus turns on fraud; it all comes down to the availability of facts and the credibility of the witness.<sup>131</sup> An imperfect solution would be to find a witness before assisting a stranger.<sup>132</sup> In order to provide a strong incentive, however, it is argued that a system of rewards would encourage potential benefactors to render necessary assistance. Aside from the above proposals, it is worth exploring more far-reaching resolutions which address the core of the issues.

### *(a) Upgrade the Social Safety Net*

The fraudulent litigation culture has, in part, been created by a lack of social welfare in China, where the injured party cannot afford medical treatment. It is estimated by China's

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<sup>128</sup> Marshall Shapo, *The Duty to Act: Tort Law, Power, and Public Policy* (Texas: University of Texas Press, 1977) 6

<sup>129</sup> Man Yee Karen Lee, 'The Role of Law in Addressing the Good Samaritan's Dilemma: A Chinese Model?' (2015) 2 (1) *Asian Journal of Law and Society* 55, 92 at 84

<sup>130</sup> Jay Silver, 'The Duty to Rescue: A Reexamination and Proposal' (1985) 26 *William & Mary Law Review* 423, 448 at 429

<sup>131</sup> Stan Abrams, 'Do we really need a Good Samaritan law in China?' *China Heresay* (1 September 2011)

<sup>132</sup> Eugene Volokh, 'Duties to Rescue and the Anti-cooperative Effects of Law' (1999) 88 *Georgetown Law Journal* 105, 114

National Bureau of Statistics that the government can only fund 1.6% of 200 million people over the age of 60 in need of care. This coverage is far below the World Bank's Standard of 8%.<sup>133</sup> The inability to pay for expensive medical treatment means that many of the injured lack any access to medical services.<sup>134</sup> Desperation forces some injured people to use whatever means to protect themselves. They are likely to accuse whoever they can get her hands on.<sup>135</sup> It is no wonder that there have been so many cases involving extortion. Affordable medical care would substantially help to reduce such social ills: the so-called "returning kindness with ingratitude".<sup>136</sup>

*(b) Create the "Presumption of Innocence"*

Justice is the primary value of the evidence system.<sup>137</sup> The case study of *Xu v Peng* highlights an irrational judgment, contrary to justice, where the Good Samaritan bears the burden of proving their innocence. They will be held liable unless they adduce evidence to discharge the burden.<sup>138</sup> Securing evidence would minimise the chances of a disingenuous claim succeeding at trial. Potential Good Samaritans could canvass for witnesses to establish *a priori* that they are not responsible for the injury of an injured person.<sup>139</sup> In August 2011, an 81-year-old woman accused a bus driver of knocking her down. The driver was ultimately

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<sup>133</sup> Benjamin Shobert, 'Senior Care in China: Challenges and Opportunities (2012) 39 China Business Review 38, 39

<sup>134</sup> Andrew Browne, 'Chinese Doctors Tell Patients to Pay Upfront or No Treatment' *The Wall Street Journal* (5 December 2005)

<sup>135</sup> Mengyun Tang, 'Does China Need Good Samaritan Laws to Save Yue Yue?' (2014) 47 (1) Cornell International Law Journal 205, 231

<sup>136</sup> ShiBao Zheng, 'Presumption of Fact and the Burden of Proof: The *Peng Yu* Case 2010 (3) Journal of Northwest University of Political Science and Law 98

<sup>137</sup> Susan Bandes, 'Protecting the Innocent as the Primary Value of the Criminal Justice System' (2009) 7 Ohio State Journal of Criminal Law 413, 438

<sup>138</sup> Wei Luo, 'Camera Dispels Woman's Post Accident Fault Claims' *Global Times* (30 August 2011)

<sup>139</sup> Stan Abrams, 'Do we really need a Good Samaritan law in China?' *China Heresay* (1 September 2011)

exonerated by video footage from a camera installed on the bus itself.<sup>140</sup> The video surveillance footage showed that a Pedi-cab hit her and the bus driver was there to help.<sup>141</sup> Gathering as much evidence as possible, via increased surveillance, would help to resolve some of the fundamental issues. From the above survey by the Hong Kong-based Phoenix Television, it appears that people would only consider rescuing an injured person if there was a camera. Recording the rescue would also avoid expensive lawsuits. In September 2011, the Ministry of Health issued the *Technical Guidelines on Intervention for Good Samaritans*. It may, however, be inappropriate for public authorities to instruct the public on whether to render assistance. When trying to help others, people who act altruistically are not driven by the benefit that they are gaining for themselves.<sup>142</sup> Ideally, it is an instinctive and natural response to help another human being who is suffering. It is now governed by legislation, which, in some ways, encourages the public to act on the basis of cost-benefit analysis.

### *(c) The Reward-Oriented Model*

Altruists may be motivated by a willingness to do the right thing, or by instrumentalist concerns. Helping others in need can provide people with the immediate gratification of emotional fulfilment, material pleasure and self-realisation.<sup>143</sup> As Landes and Posner observed: “a rescuer may be motivated by altruism or by the possibility of being regarded as

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<sup>140</sup> David Goodman, ‘Chinese Debate Aiding Strangers After Toddler’s Critical Injury’ *The New York Times* (17 October 2011)

<sup>141</sup> Shinan Liu, ‘Controversial Verdict Has Damaged Society’ *China Daily* (7 September 2011)

<sup>142</sup> Hazel Popp, ‘Altruism and the Good Samaritan’ *Philo Agora* (2006-07)  
<<http://www.philoagora.com/content/view/78/129/>>

<sup>143</sup> Robert Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* (Princeton University Press, 1993) 281; Daniel Yeager, ‘A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers’ (1993) 71 *Washington University Law Quarterly* 1, 58 at 5

a hero, and that legal inducements can impede this motivation.”<sup>144</sup> Monroe also noted that: “We do good because that is what makes us human, fully and richly human, and not just greedy and graspingly self-centred.”<sup>145</sup> This school of thought supports the notion that incentivising people with rewards distorts social and moral values.<sup>146</sup> However, it is equally common for legislators to accomplish their goals through creating a fear of sanctions and rewarding good behaviour.<sup>147</sup> In order to have substantive effect, the legal system should encourage socially positive behaviour. Rewards are powerful external motivators for altruistic acts. With particular regard to China’s current overwhelming apathy and indifference, the absence of carrots militates against strangers helping each other.<sup>148</sup> Rewarding Good Samaritans would reinforce such motivations by providing a bonus, for example, a financial incentive. Rewards can serve as an instrument for encouraging potential Good Samaritans to render timely assistance. Promoting intervention would be justified because it is in the public interest: ensuring that rescues indeed take place.<sup>149</sup>

### **3. A Suggested Guideline for Good Samaritan Law in China**

Based on the above analysis, the remedies provided to rescuers is protection normally from civil suit by the person assisted. First, the Good Samaritan Law shall protect those rescuers

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<sup>144</sup> William Landes and Richard Posner, ‘Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism’ (1978) 7 *Journal of Legal Studies* 94, 124

<sup>145</sup> Kristen Renwick Monroe, *The Heart of Altruism: Perceptions of a Common Humanity*. (Princeton: Princeton University Press, 1996) 238

<sup>146</sup> Melody Young, ‘The Aftermath of Peng Yu: Restoring Helping Behaviour in China’ (2013) 22 *Pacific Rim Law & Policy Journal* 691, 711 at 695

<sup>147</sup> Kenworthy Bilz and Janice Nadler, ‘Law, Moral Attitudes, and Behavioural Change’ in Eyal Zamir and Doron Teichman (eds.) *The Oxford Handbook of Behavioural Economics and the Law* (Oxford, Oxford University Press, 2014) 241-267

<sup>148</sup> Melody Young, ‘The Aftermath of Peng Yu: Restoring Helping Behaviour in China’ (2013) 22 *Pacific Rim Law & Policy Journal* 691, 711

<sup>149</sup> Hanoch Dagan, ‘In Defence of the Good Samaritan’ (1999) 97 (5) *Michigan Law Review* 1152, 1200, at 1189

who act in good faith. It is a reasonable behaviour that falls within the ambit of the proposed law. The concept is generally defined to be a behaviour that a hypothetical person with similar qualification would reasonably consider appropriate to do in a similar circumstance.<sup>150</sup> Reasonable behaviour should be interpreted broadly, including whether it is compatible with the overall societal expectation. Such a legislative intent is well embodied in both common law and civil law systems.<sup>151</sup> In case of gross negligence but with *bona fide*, leniency should be considered to mitigate potential penalty against the rescuer. Second, the rescuer shall be subject to primarily civil liability if necessary, whereas criminal liability can only be triggered in an extreme *mala fide* case. Put differently, the criminal liability should play a deterrent role to a greater extent. Last but not least, the law should serve primarily as a leverage between action and inaction in the transitional period of China's transformation. As discussed under the sub-heading 4 of Part III, the middle-ground position should lie between the French and British models. The legislative intent is to be manifested with the support of other complementing mechanisms, such as the reward-oriented model and self-protection measures. The recent Shanghai Good Samaritan Law reflects a prudent approach. The new law encourages people to become "Good Samaritans" by granting legal immunity even if their efforts result in harm. A precondition is that citizens should first call Emergency Hotline 120, and then carry out first aid but only under the guidance of emergency operators.<sup>152</sup> Equivalently, Beijing Good Samaritan Law provides that citizens shall provide

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<sup>150</sup> Civil Liability of Good Samaritans and Volunteers. Dublin: Law Reform Commission, 2009)

A number of factors courts should consider in determining whether a particular rescuer's behaviour is reasonable or not, that is, (i) the probability of an accident caused by the rescuer's behaviour; (ii) the gravity of the threatened injury; (iii) the cost of eliminating the risk; and the social utility of the rescuer's conduct.

<sup>151</sup> Indiana Code §34-30-12-1 s1 (b) "a person who comes upon the scene of an emergency or accident...and in good faith, gratuitously renders emergency care ... is immune from civil liability...; except for acts or omissions amounting to gross negligence."

<sup>152</sup> Shanghai's long-awaited Good Samaritan Law was adopted on 29 July and went into effect on 1 November 2016.

first aid, but strongly encourage calling the Emergency Hotline 120 in the first instance.<sup>153</sup>

Both laws provide effective flexibility with an aim to relieve citizens' fear of liability, and incentivise them to behave altruistically. After all, China's legal system embodies a combination of moralism and law.<sup>154</sup> It is bound to be a long-standing systematic mission to cultivate spirit of "Good Samaritan". Any hasty premature legal reform may produce counterproductive effect.

## Conclusion

The interpersonal trust crisis could deteriorate without legal support. China's dramatic changes in social conditions legitimates aligning legal obligations with moral expectations. It is the right time to introduce a national Good Samaritan law to counteract the moral apathy which is so prevalent in China. A duty to rescue is generally incompatible with individualistic values, which, as discussed, is at the heart of the common law. Collectivism, rather than individualism, is preferable in China. The social and legal context in China makes it possible to introduce a civil law version of a Good Samaritan law. It is thus imperative for a moral duty to be embodied in the national law, while protecting people who assist others in emergency situations from being falsely accused. New legislation should protect rescuers from legal liability for the harm suffered by a rescued victim. The primary legislative intent should be to shield the innocent from extortion. The new law can achieve this by penalising those who make false accusations, and by rewarding witnesses who provide reliable testimonies. In the long run, having a legally enforceable duty will help to deter such false

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<sup>153</sup> Beijing Good Samaritan Law (effective on 1 March 2017) Article 44

<sup>154</sup> Percy R. Luney Jr, 'Traditions and Foreign Influences: Systems of Law in China and Japan' (1989) 52 (2) Law and Contemporary Problems 129, 150



accusations. Furthermore, it is vital to address the deep-rooted and systematic issues which underscore Good Samaritan laws. This includes addressing institutional perspectives. China should foster a civil society, as well as promoting a reliable judiciary and effective surveillance system, in order to respond to the rapidly transforming society. Until the public's trust is restored in the judicial system, there is a long way to go before the proposed Good Samaritan law can have a real transformative effect on the public's morality.